No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1991

KENNETH L. McGINNIS, et al,

Petitioners,

v

JAMES ANTHONY SWEETON, et al,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

WHETHER STATE STATUTES AND REGULATIONS WHICH SET FORTH PROCEDURES FOR THE PAROLE REVIEW PROCESS BUT WHICH CONFER NO SUBSTANTIVE RIGHTS AND IMPOSE NO LIMITATIONS ON THE DISCRETION OF THE PAROLE BOARD GIVE RISE TO A LIBERTY INTEREST PROTECTED BY THE DUE PROCESS CLAUSE.

II

WHETHER THE CONTINUED ENFORCEMENT OF A 1981 CONSENT DECREE, DESIGNED SOLELY TO FORCE MICHIGAN TO COMPLY WITH ITS OWN STATUTORY PROCEDURES REGARDING PAROLE BOARD ACTIVITIES, IS BARRED BY THE ELEVENTH AMENDMENT.

LIST OF PARTIES

The Petitioners are Kenneth L. McGinnis, Director of the Michigan Department of Corrections; Martin Makel, Marvin May, Jacqueline E. Moss-Williams, Ronald E. Gach, Sandra J. Johnson, Thomas Patten, Members of the Parole Board of the State of Michigan, all of whom have been automatically substituted as parties pusuant to Supreme Court Rule 35.3. The lawsuit was initially brought against Perry Johnson, Director of the Michigan Department of Corrections; Leonard McConnell, Chairman of the Parole Board of the State of Michigan; Gordon Fuller, Howard Grossman, Hondon Hargrove, Donald Thurston, Delores Tripp, Edward Turner, Members of the Parole Board of

the State of Michigan. During the District Court proceedings, Robert Brown, Jr., succeeded to the office of Director and was substituted for Perry Johnson as a party.

The Respondents are James Anthony Sweeton, Oscar Partee and James Sikon, individually and on behalf of all other persons similarly situated.

All parties in the District Court and Court of Appeals are parties in this Court.

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The Opinion of the United States Court of Appeals for the Sixth Circuit was not recommended for publication and is reprinted at App 1-56a. The underlying Opinion of the U.S. District Court for the Eastern District of Michigan was filed August 17, 1978, and appears as App 109-126a.

JURISDICTION

The Opinion of the Court of Appeals was entered on September 17, 1991. The jurisdiction of the Court is invoked pursuant to 28 USC § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution provides as follows:

> The Judicial power of the United States shall not be construed to extend to any suit in law or in equity, commenced or prosecuted

> against one of the United States by Citizens of another state or by Citizens or Subjects of any Foreign State.

Section 1 of the Fourteenth Amendment to the United States Constitution provides as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Complaint below was filed on September 16, 1977 on behalf of a class of all inmates within the jurisdiction of the State of Michigan Department of Corrections (MDOC), whose parole eligibility is determined by the State of

Michigan Parole Board. The Complaint, as amended, alleged several counts claiming a violation of the Fourteenth Amendment attributable to Parole Board procedures, and a pendent state claim alleging that the State was not complying with its statutes and regulations in the criteria used to grant or deny paroles.

In March, 1978, Petitioners filed a motion to dismiss or in the alternative for summary judgment. On August 17, 1978, the U.S. District Court for the Eastern District of Michigan granted Petitioners' motion to dismiss "... as to the claims raised under the United States Constitution," (App 111a), but denied the alternative motions as to the remaining claim "... that the State is not complying with its own statutes and

regulations," in deciding whether or not to grant parole release to Respondents. (App 111a). On November 16, 1978, an order entered granting the Respondents' request for class certification.

The District Court held, as a basis for granting Petitioners' Motion to Dismiss, that the United States Supreme Court and the Sixth Circuit Court of Appeals previously established that requirements of due process were inapplicable to parole release hearings. Thus, all claims brought in the Complaint concerning due process violations under the Constitution of the United States were dismissed. There was no appeal taken by the Respondent class to this ruling.

The only issue remaining was whether the State of Michigan was complying with

its own statutes and regulations when deciding parole cases. Although the District Court opined that established procedures must be followed by the Parole Board to avoid "abrogating" a prisoner's rights (even though there was no doubt in the opinion of the District Court, or the Court of Appeals, that there never existed in this case a liberty interest to a parole, see App 18-19a), the District Court contemplated rendering a decision on the remaining issue of compliance with statutory regulations after a more complete record was developed. (App 125a).

On August 24, 1979, Petitioners filed an Answer to the First Amended Complaint denying federal jurisdiction and moved for abstention on the remaining claim on

October 5, 1979. The case was reassigned to another district judge who rendered a "Judgment" dated March 31, 1981 on three outstanding issues concerning inmates' access to files, distribution of an informational booklet, and the request for abstention. Contained in the Opinion that accompanied the March 31, 1981 "Judgment" were the comments about the previously rendered Opinion of August 17, 1978 in which the District Court asserted that the first District Judge actually decided that parole procedures alone created a liberty interest.

After a period of negotiations, a Consent Judgment was entered on August 28, 1981 consisting of very detailed procedural requirements designed solely to improve the parole process.

(App 62-108a). The introductory clause to the 1981 Consent Decree states: "[P]ursuant to the statutes, rules and policies which establish, define, and regulate the parole process, this process should be administered in an effective and fair manner, and afford each prisoner the rights to which he or she is entitled." (App 64a). The 1981 Consent Decree was silent as to what issues were resolved, nor was there any language constituting waiver of any defenses that Petitioners may have.

Most provisions of the 1981 Consent Decree tracked state law procedure regarding parole hearings. One provision of the 1981 Consent Decree states:

> Nothing herein is intended to alter, modify, divest, or otherwise limit the rights and duties which the Legislature has provided to the Parole Board within the parole

decision-making process.
(App 80a).

The 1981 Consent Decree also placed a limitation upon the jurisdiction and duration of the case in paragraph VIII, L providing:

> Plaintiffs' participation in monitoring described in this section shall continue for 30 months, unless the Court extends this period for good cause shown. The court shall retain jurisdiction of this cause for the pendency of this monitoring period, and shall have the power to make further orders consistent with the decree.
> (App 95-96a).

Petitioners filed a Motion to Vacate the Judgment on February 27, 1984 on jurisdictional grounds, including an assertion of the Eleventh Amendment. On March 1, 1984, Respondent filed a Motion to Extend the Monitoring Period.

On May 31, 1984, the District Court issued an Opinion, but no Order, denying the Motion to Vacate and also suggesting that the Respondents close out the monitoring period through submission of a final report. For reasons not appearing of record, the District Court delayed entry of an Order denying the Petitioners' Motion to Vacate until November 28, 1984. Also, on November 28, 1984, the District Court entered an Order extending the monitoring period retroactively to end on November 30, 1984.

A final monitor's report was filed on June 18, 1985, characterizing the actions of Petitioners as consistently making a good faith effort to comply with the Judgment. There was no further relief sought from the District Court by either party.

After years of repose, new attorneys for Respondents filed appearances, and the District Court reopened monitoring on June 16, 1988, after finding non-compliance with the 1981 Consent Decree.

In February, 1990, Respondents filed a motion for an order finding Petitioners in non-compliance with the Consent Judgment and for appointment of a special master.

In March, 1990, Petitioners filed, pursuant to Fed. R. Civ. P. 60(b)(4) and (5), a Motion to Vacate the 1981 final Consent Judgment and dismiss the action asserting lack of jurisdiction to enter the Order, and that tne 1981 final Order was void as a matter of law. On May 24, 1990, the District Court entered an Order denying the Motion to Vacate and Dismiss,

finding that jurisdiction existed and that Petitioners were non-compliant with the consent decree. (App 57-61a). The District Court also granted one modification to the Consent Decree, continued the monitoring for one year, and appointed a U.S. Magistrate as a special master/ independent monitor. Both Petitioners and Respondents requested rehearings which were denied. Both Petitioners and Respondents filed appeals.

On September 17, 1991, the United States Court of Appeals for the Sixth Circuit filed an Opinion affirming the District Court's denial of the Motion to Vacate, but reversing the District Court's one modification. (App 1-56a). The Court of Appeals, with respect to the jurisdictional issue of what liberty

interest was underlying the 1981 consent decree, said:

> The lower court on numerous occasions stated that the liberty interest involved is not in the right to parole, since none exists under the Greenholtz rationale, infra, but in the state-created procedures that make up the parole decision-making process.
> (App 18-19a) (Emphasis added).

The Court of Appeals has characterized the liberty interest, as the District Court did, as one which was purely procedural existing without a specific substantive predicate:

> In sum, although the Parole Board may have discretion in the eventual parole decision, the state, through statutes and regulations, has taken away any discretion in parole procedures. Therefore, the Michigan parole scheme is not wholly discretionary -- it limits the Parole Board's authority by requiring it to follow certain procedures.
> (App 24a).

The Eleventh Amendment defense to jurisdiction was summarily denied by the

Court of Appeals. Specifically, the Court of Appeals stated that the Eleventh Amendment was not a bar to the District Court's jurisdiction because the 1981 Consent Decree was based upon state law "... only to the extent that the state laws created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment." (App 26a, n7).

One Court of Appeals Judge concurred in the September 17, 1991 judgment and all but Part II (Jurisdiction) of the Opinion observing that the District Court's power to grant relief from the outset was "problematic," and further stated:

> The problem was that neither state law nor federal law created any substantive right to the "liberty" that release on parole would represent. The district court tried to circumvent the problem, as has been noted, by holding that when the state

required "that certain procedures be followed in determining whether or not an inmate is entitled to parole, independent liberty interests are created ...." In the light of subsequent case law, it is safe to say that this analysis was almost certainly incorrect.

* * *

It is probably unfortunate that this case was permitted to go forward in a federal court. The defendants having accepted the federal court consent decree without reservation, however, I agree that the challenge to the court's jurisdiction comes too late. (App 52-56a).

This Petition follows the September 17, 1991 Court of Appeals Opinion.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS RULING WHICH FOUND THAT THE CREATION OF A LIBERTY INTEREST CAN ARISE FROM PROCEDURAL PROVISIONS UNCONNECTED TO A SUBSTANTIVE LIMITATION ON OFFICIAL DISCRETION IS SQUARELY IN CONFLICT WITH THE DECISIONS OF THIS COURT AND OF OTHER CIRCUITS, INCLUDING THE SIXTH CIRCUIT.

The Court of Appeals Opinion that procedures alone created an enforceable decree in federal court, without the existence of a substantive predicate liberty interest is contrary to the U.S. Supreme Court's numerous decisions, many cited by the Court of Appeals in support of its conclusion, starting with Wolff v. McDonnell, 418 U.S. 539 (1974), and concluding with Kentucky Dept of Corrections v. Thompson, 490 U.S. 454 (1989).

The Court of Appeals' Opinion in this

case (see App 18-19a) readily acknowledged, as the District Court did in its 1978 Opinion dismissing all "... claims raised under the United States Constitution," that there never existed a substantive interest to a parole. The grant of a parole in Michigan is discretionary under state statutes. There is no dispute by the parties, the District Court, or the Court of Appeals that the remaining issue, after dismissal of all claims under the United States Constitution, was whether the State was complying with its own procedures regarding the exercise of discretion in granting or denying paroles. Indeed, the Consent Decree entered in this case never purported to do anything more than to impose a highly intrusive procedural scheme designed to track state law on parole release hear-

ings, and monitor how well or poorly the state was complying with the process alone. The Consent Decree itself never created an entitlement to parole, because the District Court properly ruled there was none. (App 117-118a).

The Court of Appeals, in purporting to engage in the required careful analysis contemplated by Kentucky Dept of Corrections v. Thompson, supra, offered the following observation:

> In sum, although the Parole Board may have discretion in the eventual parole decision, the state, through statutes and regulations, has taken away any discretion in parole procedures. Therefore, the Michigan parole scheme is not wholly discretionary -- it limits the Parole Board's authority by requiring it to follow certain procedures. (App 24a) (Emphasis added).

Completely ignored by the Court of Appeals is paragraph V.B.4 of the 1981

consent decree memorializing the opposite conclusion:

> Nothing herein is intended to alter, modify, divest or otherwise limit the rights and duties which the Legislature has provided to the Parole Board within the parole decision-making process.
> (App 80a).

The consent decree provision clearly recognizes the discretion of the Parole Board, as well as effectively undercuts the entire rationale offered by the Court of Appeals in reaching its conclusion.

The concurring Opinion by the Court of Appeals correctly observed, regarding the subject matter jurisdiction, that not only was the power to grant relief from the outset "problematic", but that it was also "unfortunate that this case was permitted to go forward in a federal court"

and that the District Court's analysis was "... almost certainly incorrect" in light of the case law regarding creation of substantive rights entitled to due process protection. (App 52-54a). Indeed, the concurring Court of Appeals Opinion also correctly identified the problem of a complete absence of a substantive right as representing an obstacle for the District Court to "circumvent," leading, of course, to the flawed conclusion, affirmed by the Court of Appeals, that process alone can establish a liberty interest entitled to more due process. (App 53a).

The fact that a consent decree was involved in resolving the remaining State claim does nothing to alleviate the basic requirement that a substantial federal

question must first exist for a federal court to not only assume jurisdiction, but to continue retaining it. This case is not a matter involving mere over-breadth of a remedy contained in a consent decree that also resolves clear substantial federal questions such as Duran v. Carruthers, 885 F.2d 1485 (10th Cir. 1989), cert. denied, 110 S.Ct. 865 (1990).

A continuing theme reappearing in Supreme Court cases analyzing due process claims, particularly concerning parole release decisions, is the need to establish an interest in parole release as the predicate to triggering due process considerations. In Board of Pardons v. Allen, 482 U.S. 369, 377-378 (1987), this Court said, "Significantly, the Montana

statute, like the Nebraska statute, uses mandatory language ("shall") to 'creat[e] a presumption that parole release will be granted' when the designated findings are made." (Footnote omitted). The Court in Olim v. Wakinekona, 461 U.S. 238, 249 (1983), further explained that a protected liberty interest is created "... by placing substantive limitations on official discretion." The uncontested finding of the district court in this case is that, "... in this circuit at least, the requirements of due process are not applicable to parole release hearings." (App 117-118a).

The fact that there was an affirmative finding of the nonexistence of a substantive right to parole should have ended whatever questions the Court of

Appeals might possibly have harbored about whether a liberty interest was created or was underlying the consent decree. Instead, the Court of Appeals Opinion concludes, without the requisite close analysis of relevant statutes, that their opinion does not constitute a departure from established Supreme Court precedent.

Indeed, one only needs to read Kentucky Dept of Corrections v. Thompson, supra, 490 U.S. at 461, to be reminded that the proper analysis and inquiry "always has been to examine closely the language of the relevant statutes and regulations" to discern the existence of "... relevant mandatory language that expressly requires the decisionmaker to apply certain substantive predicates in

determining whether an inmate may be deprived of the particular interest in question." Id. at 464, n4.

Allowing procedural rules rather than a substantive right to be elevated to a liberty interest results in process becoming an end in itself, and a "needless formality." Olim v. Wakinekona, supra, 461 U.S. at 250. In Brandon v. District of Columbia Board of Parole, 823 F.2d 644 (DC Cir. 1987), the Court rejected the plaintiff's claim to a parole hearing as a liberty interest because of the "... overwhelming logic of the Supreme Court's pronouncement in Olim and the plethora of case law against him." Id. at 648. The Court in Brandon declined to expand the concept of procedural due process and joined several

other circuits which held similarly, including the Sixth Circuit in Naegele Outdoor Advertising Co v. Moulton, 773 F.2d 692, 703 (6th Cir. 1985), cert. denied, 475 U.S. 1121 (1986). The observations made in the Brandon Opinion are compelling and succinct:

> ... Brandon would have us interpret the Due Process Clause to mean that the Board may not deprive him of his parole hearing without providing him a hearing. This circular result demonstrates the illogic of attempting to locate a separated protected liberty interest in procedural rules created by governmental bodies. In fact, Brandon asks us to abandon altogether the standard due process analysis. Instead of identifying the substantive interest entitled to constitutional protection and then determining what process is due before an individual can be deprived of that interest, see Morrissey, 408 U.S. at 481, Brandon would have us equate the process due with the substantive interest.
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> * * *
>
> If Brandon's approach were adopted, there would be a constitutional procedural due process right to have

states adhere to any procedural rules promulgated by them." Id. at 648-649.

The ease with which the Court of Appeals in Inmates of Orient Correctional Institute v. Ohio State Adult Parole Authority, 929 F.2d. 233 (6th Cir. 1991), analyzed an identical claim involving a release on parole liberty interest issue suggests that the conclusion in this case was influenced by the existence of a consent decree. (App 27a, 32-36a). As this Court is aware, the existence of a consent decree was also a factor in Kentucky Dept of Corrections v. Thompson, supra, leading to a reversal of the Court of Appeals' Opinion that a liberty interest to prison visitation was created by a consent decree and State regulations in that case.

The mere existence of a consent decree in federal court does not guarantee that a substantial federal question was ever presented, resolved or served to vindicate federal rights. A federal court is obligated to consider threshold Article III impediments both to the initiation and maintenance of an action. Glass Packaging Institute v. Regan, 737 F.2d 1083 at 1087-1088 (DC Cir), cert. denied, 496 U.S. 1035 (1984). The Supreme Court has emphasized the limitations on the power of federal courts to hear claims filed by persons challenging "the way in which government goes about its business" of enforcing the law. Allen v. Wright, 468 U.S. 737, 760 (1984); Stern v. Tarrant County Hosp. Dist., 778 F.2d 1052, 1060 (5th Cir. 1985) (en banc), cert. denied, 476 U.S.

1108 (1986): "The federal judiciary, for its part, has enough federal law to enforce without annexing new bodies of state legislation. We must, and will, leave violations of state law to be corrected by the appropriate state mechanisms."

The ability of a federal court to enter a consent decree "... must spring from and serve to resolve a dispute within the court's subject-matter jurisdiction." Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 525 (1986).

All federal courts have a duty to notice a failure of subject-matter jurisdiction on its own motion and to correct the mistake no matter how belated even on appeal. Potomac Passengers Ass'n. v.

Chesapeake & Ohio Ry Co., 520 F.2d 91, 95 (DC, Cir. 1975).

When the District Court entered the consent decree in 1981, all claims under the U.S. Constitution had been dismissed on the finding contained in the August 17, 1978 Opinion that Michigan statutes provided no substantive right to a release on parole. The District Court in 1981 had only the pendent claim concerning allegations that the state was not following its regulations in granting or denying paroles when the consent decree was entered. The consent decree entered in 1981 could not spring from and serve to resolve a dispute within the subject-matter jurisdiction of the Court, especially on a theory that process alone needs due process protections. The Sixth

Circuit's opinion in Wal-Juice Bar, Inc. v. Elliott, 899 F.2d 1502 (6th Cir. 1990), reh'g denied, held that before a district court addresses state issues it must first determine that a substantial federal issue is presented. Without a substantial federal question underlying the consent decree, as discerned from pre-existing decisions of the Supreme Court, a decision on state claims, as in this case, should not have been made and the decree should be vacated.

II.

THE COURT OF APPEALS DECISION IMPROPERLY DENIED PETITIONERS' ASSERTION OF AN ELEVENTH AMENDMENT DEFENSE BY ERRONEOUSLY HOLDING THAT THE CONSENT DECREE WAS BASED UPON THE CREATION OF A LIBERTY INTEREST PROTECTED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The erroneous determination by the Court of Appeals that a liberty interest

was created by process alone and further that the consent decree "... was based on state law only to the extent that the state laws created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment" (App 24a, 26a), constituted the basis upon which Petitioners were denied an Eleventh Amendment defense.

As presented in Part I of this Petition for Writ, there was never a viable federal claim that could attach to the remaining issue after the District Court dismissed all claims under the U.S. Constitution and the remaining issue, enforcement of State procedures, implicated no federal rights. Indeed, the consent decree also memorialized the discretion still retained by the Parole

Board on the decision to release on parole. (App 80a).

The need in this case for the Court of Appeals to find that a liberty interest had been created was necessary to circumvent the strictures of Pennhurst State School v. Halderman, 465 U.S. 89 (1984), which bar a federal court from assuming or retaining a case that served to enforce only State law.

In Lelsz v. Kavanagh, 807 F.2d. 1243 (5th Cir), reh'g denied, 815 F.2d 1034 (5th Cir), cert. dismissed, 483 U.S. 1057 (1987), the Fifth Circuit, in a case very analogous to the present case, undertook a careful examination of a consent decree which had been entered in 1983. The consent decree was 45 paragraphs of specific and general guidelines for improvement of

mental health services rendered by the State. The Court in Lelsz found the Eleventh Amendment, particularly as analyzed in Pennhurst, supra, barred enforcement of provisions which merely tracked State law and also forbade the District Court, on remand, from enforcing provisions grounded in State law.

The present case represents an even clearer basis upon which the bar of the Eleventh Amendment should have been applied. In this case, there is a complete absence of a federal right that was either resolved or undergirds the decree. There is not a single paragraph of the entire consent decree in this case that serves to resolve a dispute within the jurisdiction of the Court. This case represents a clear example of enforcement

of highly intrusive procedures that track State law and thus represents a square conflict with numerous Supreme Court rulings construing the application of the Eleventh Amendment.

The defense of the Eleventh Amendment was raised by Petitioners before the Court of Appeals, and when raised, the Court of Appeals should have examined each claim to discern if any are barred, as was done by the Court in Lelsz v. Kavanaugh, supra. The Court of Appeals in this case found a liberty interest without the requisite analysis, and then deprived Petitioners of a valid Eleventh Amendment claim on the basis that procedures alone could create a liberty interest.

CONCLUSION

The Court of Appeals decision is contrary to a long line of Supreme Court precedent on creation of a liberty interest, contrary to the ban against enforcing State law as enunciated in Pennhurst, supra, and contrary to the command that consent decrees must resolve disputes within the Court's subject matter jurisdiction as articulated in Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland, supra.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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Nos. 90-1800/1807

JAMES ANTHONY SWEETON, et al.)
Plaintiffs-Appellees-)
Cross-Appellants)
v

ROBERT BROWN, JR., et al.)
Defendants-Appellants-)
Cross-Appellees)

ON APPEAL from the United States District Court for the Eastern District of Michigan

Decided and Filed September 17, 1991

Before: NELSON and GUY, Circuit Judges; and HIGGINS, District Judge*

HIGGINS, District Judge.

The defendants (appellants) appeal and the plaintiffs (appellees) cross-appeal the district court's order denying

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*The Honorable Thomas A. Higgins, United States District Judge for the Middle District of Tennessee, sitting by designation.

the defendants' motion to dismiss and partially modifying a consent decree issued in 1981. For the reasons that follow, we affirm in part, reverse in part and remand.

I. Background

This appeal arises out of a final consent judgment entered into between the State of Michigan Department of Corrections and a class of inmates and approved by the district court on August 28, 1981. This action was brought in September 1977 by a class of inmates within the jurisdiction of the State of Michigan Department of Corrections (MDOC), whose parole eligibility is determined by the State of Michigan Parole Board. The defendants/appellants are the director of the MDOC and the members of the Michigan Parole

Board. The suit challenges the practices of the MDOC and the Parole Board concerning the timeliness of hearings and decisions and the lack of guidelines in the parole decision-making process. This action does not concern the actual granting of parole, but only the procedures in making and implementing parole decisions. The inmate class asserts that the MDOC and Parole Board have violated their rights to due process under the Fourteenth Amendment to the Constitution of the United States.

A review of the history of this action is helpful in understanding the lower court's rulings concerning the consent decree and the most recent ruling granting a modification.

1977-1987

The complaint was filed by the inmate class on September 15, 1977, addressing

the issues discussed above.

In March 1978, the appellants filed their first motion to dismiss or, in the alternative, for summary judgment for failure to state a federally cognizable cause of action. In August 1978, the district court (Feikens, J.) granted the appellants' motion to dismiss as to the claims raised under the Constitution of the United States, but denied the alternative motion as to the claim that the State of Michigan was not complying with its own statutes and regulations when deciding whether to grant parole. In granting the motion, the lower court held that the Supreme Court of the United States and the Sixth Circuit Court of Appeals had previously established that the requirements of due process are not applicable to parole release hearings.

Accordingly, the court dismissed the appellees' claims that the procedures employed by the State of Michigan violated their rights to due process under the Constitution of the United States. Therefore, the only issue that the court left open was whether there arose a state-created liberty interest by way of statutes, rules or procedures that would entitle the appellee class to due process protections. The appellee class did not appeal this ruling.

In October 1979, the appellants filed another motion to dismiss or, in the alternative, a motion for abstention order. The appellants argued that the issues presented in the action were dependent upon a judicial interpretation of state statutes, rules, policies and regulations, which are all matters more

properly within the domain of the state courts. Alternatively, the appellants asserted that the district court should abstain from ruling in the action, pending resolution of the issues by state tribunals. In March 1980, after the case was subsequently reassigned to the Honorable Anna Diggs Taylor upon her appointment to the federal bench, the court heard oral argument and denied the appellants' motion.

The parties stipulated to a series of partial consent judgments in March and April 1980. These partial consent judgments were consolidated and, after notice to all class members, the district court approved a final partial consent judgment in December 1980.

Thereafter, cross-motions for summary judgment were filed concerning the appel-

lees' access to their MDOC records. These claims were resolved in the appellees' favor by the court's order dated March 31, 1981. In this order and opinion, many of the due process issues that the appellants presently raise are addressed. The district court stated:

> Most importantly, the law of this case, as formulated by Judge Feikens more than two years ago when this litigation was on his docket, is that the existence of state statutes, regulations and policies regarding the parole system as a whole impart <u>independent</u> liberty interests to those inmates participating in the system. (emphasis in original).

The appellants appealed the above ruling. On August 28, 1981, the court signed a final order approving a final consent judgment. This final consent judgment was a consolidation of the earlier final partial consent judgment, the

court's March 31, 1981, order and stipulations of the parties. Also on August 28, 1981, the court amended its order of March 31, 1981. In December 1981, the appellants dismissed their appeal because the terms of the final consent judgment were satisfactory to all parties and the basis for their appeal no longer existed.

The final consent decree provided for a monitoring period of thirty months, which the court later extended until December 1984. The monitoring provision also deals with jurisdiction. Paragraph VIII(L) provides:

> Plaintiffs' participation in monitoring described in this section shall continue for 30 months, unless the Court extends this period for good cause shown. The Court shall retain jurisdiction of this cause for the pendency of this monitoring period, and shall have the power to make further orders consistent with this decree.

In February 1984, the appellants filed their first motion to vacate the final consent judgment pursuant to Rule 60(b), Fed. R Civ. P. The appellants claimed, inter alia, that:

1. the consent judgment was based exclusively on state law and thus the lower court lacked jurisdiction to enter it;

2. prior to entering the 1981 judgment, the lower court did not have a full opportunity to review the impact of the Supreme Court's 1979 decision in Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1, 99 S.Ct. 210, 60 L.Ed.2d 668 (1979); and

3. the consent judgment should be vacated because of statutory changes that were not in effect at the time of the

court's earlier decision.

In November 1984, after briefing and argument by the parties, the lower court denied the appellants' motion to vacate the final consent judgment. The appellants did not seek rehearing or appeal this decision.

At the hearing on the appellants' motion, the district court (Taylor, J.) stated:

> The Court's jurisdiction over this case is and was proper, and this judgment may not now be vacated under the Federal Rules as being void. The Federal Court has jurisdiction to determine its own judicial authority. So, if the defendant has challenged the Court's subject matter jurisdiction and the Court issue has been resolved against defendant by a final judgment, the judgment is not void but is Res Judicata on the issue of jurisdiction.
>
> In this case the Defendants have challenged the Court's subject matter jurisdiction at least three times, and ruled [sic] against at least that many times on, specifically, the question of whether this Court had

> jurisdictional authority to hear and decide this case.

Transcript, May 31, 1984.

A final monitor's report was submitted in June 1985. On June 18, 1985, the parties stipulated to termination of the monitoring period.

1987-1990

In August 1987, the lower court reopened this case and appointed substitute counsel to represent the inmate class in light of indications that the appellants had not complied with the final consent decree. The appellants did not respond to the reopening of the case. The appellees then began discovery and renewed monitoring the appellants' compliance with the consent judgment.

In June 1988, after a hearing, the

district court imposed sanctions on the appellants for failure to comply with an order to compel discovery and answer interrogatories. The court also found the appellants to be in noncompliance with the final consent judgment and ordered a reinstitution of the formal monitoring process for a period of one year. The appellants neither sought rehearing nor appealed this ruling.

1990 to Present

In January 1990, the appellees filed a monitoring report, and, in February 1990, they filed a motion for an order finding the appellants in noncompliance with the consent judgment and for appointment of a special independent master or monitor. The monitoring report showed that the appellants failed to

implement parole guidelines as required by the consent decree.

In March 1990, the appellants filed another motion to vacate the final consent judgment and dismiss the action. The appellants again asserted that the court lacked jurisdiction to enter the final order and that it was void as a matter of law. The appellants' motion sought, alternatively, to modify the consent order to reflect the state statutory changes that had occurred since the consent decree was entered. The appellants based their motion on Rule 60(b)(4), Fed. R. Civ. P., for lack of jurisdiction, and Rule 60(b)(5), Fed. R. Civ. P., for modification of the consent judgment.

In May 1990, the district court entered an order specifically finding that it had jurisdiction and granting one

modification to the consent decree in order to comport with the timeliness standards of Michigan Compiled Laws Annotated (M.C.L.A.) § 791.235(1).[1] The court denied the appellants' motion to vacate and dismiss the action. Although it concluded that there was no liberty interest in the right to parole under the Michigan statute, the lower court found that the inmates have a liberty interest in the procedure. The court also ordered continued monitoring for one year, and thereafter appointed a U.S. Magistrate as the special master/independent monitor.

Both parties filed motions for rehearing, which were denied. Thereafter, both parties appealed.

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[1]The court denied the appellants' other requests for modifications to the consent decree.

II. Jurisdiction

The appellants' issue on appeal is whether the district court erred in denying their motion to vacate the consent judgment pursuant to Rule 60(b)(4), Fed. R. Civ. P., and to dismiss the action for lack of subject matter jurisdiction.[2]

The appellants argue that an inmate confined in the Michigan prison system does not have a constitutionally protected right to parole and that the consent decree could not create such a liberty interest. The appellants maintain that the district court acknowledged that there was no protectible right to parole and, therefore, erred by not vaca-

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[2]The appellants do not appeal the district court's denial of their other requests for modifications to the consent decree.

ting the consent decree, since it no longer had any basis to retain subject matter jurisdiction. Without jurisdiction, the consent judgment is void.

Futhermore, the appellants assert that it was error for the district court to impose procedures without first finding that a right to parole was created by the language of the Michigan parole statute. The Court notes two errors in this statement. First, the district court did not impose procedures upon the appellants. The district court merely enforced the provisions of the consent decree which the appellants voluntarily entered into before they presented it to

the court for its approval.[3] Second, the appellants continue to insist that the liberty interest involved here is the

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[3]The Supreme Court in Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 522, 106 S.Ct. 3063, 3075, 92 L.Ed.2d 405, 423 (1986), stated: "Indeed, it is the parties' agreement that serves as the source of the court's authority to enter any judgment at all. ... More importantly, it is the agreement of the parties, rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in a consent decree." (citations omitted).

right to parole.[4] The lower court on numerous occasions stated that the liberty interest involved is not in the right to parole, since none exists under

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[4]The appellants cite two Michigan Court of Appeals cases for the proposition that the Michigan parole statutory scheme does not create a liberty interest. We find both cases inapplicable. In Hurst v. Dep't of Corrections Parole Bd., 119 Mich. App. 25, 325 N.W.2d 615 (Mich. Ct. App. 1982), the court concluded that the early parole provision of the Michigan statute created only an expectation or hope of an early parole. Therefore, the court held that the statute did not create a right to parole. This is in accordance with our current views; however, it does not deal with a liberty interest in state-created procedures, which is the issue at hand. The court in Shields v. Dep't of Corrections, 128 Mich. App. 380, 340 N.W.2d 95 (Mich. Ct. App. 1983), ruled that the inmate who was provided with a parole hearing and informed of the reasons for denial of parole was afforded adequate due process. That case is not applicable because there the state adequately followed its procedures; whereas in the present case, the district court found the state to be in noncompliance with its procedures on numerous occasions.

the Greenholtz rationale, infra, but in the state-created procedures that make up the parole decision-making process. This is a fundamental element of this action, which should not be further mischaracterized.

The Supreme Court in Greenholtz concluded that a convicted person has no inherent constitutional right to parole. However, it stated that a court must look to the language of policies, statutes and regulations of the state to determine whether it has created any protectible rights. Further, this is to be decided on a case-by-case basis. 442 U.S. at 7-12, 99 S.Ct. at 2104-06, 60 L.Ed.2d at 675-79.

This was not a departure from its earlier holdings, in which the Supreme Court clearly ruled that protectible lib-

erty interests may arise from state-created statutes, regulations, rules and policies. See Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) (Nebraska law established liberty interest in prisoners' good-time credits); Board of Pardons v. Allen, 482 U.S. 369, 107 S.Ct. 2415, 96 L.Ed.2d 303 (1987) (Montana statute created a liberty interest in parole); Vitek v. Jones, 445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980) (Nebraska statute conferred a protected interest in involuntary transfer to state mental hospital); Hewitt v. Helms, 459 U.S. 460, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983) (Pennsylvania statutory framework gave rise to a liberty interest in remaining in the general prison population). But see Meachum v. Fano, 427 U.S. 215, 96 S.Ct. 2532, 49

L.Ed.2d 451 (1976) (Massachusetts law did not create a protected liberty interest in prison transfers); Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989) (Kentucky regulations did not establish a liberty interest in prison visitation).

The Sixth Circuit has followed the Supreme Court's rationale and has also recognized state-created interests protected by the Due Process Clause. See Spruytte v. Walters, 753 F.2d 498 (6th Cir. 1985), cert. denied, 474 U.S. 1054 (1986) (Michigan created a protected interest in prisoners receiving non-threatening books); Walker v. Hughes, 558 F.2d 1247 (6th Cir. 1977) (a federal prison in Michigan had policy statements that granted a liberty interest to prisoners in not having sanctions imposed on

them except upon a finding of major misconduct); Mayes v. Trammell, 751 F.2d 175 (6th Cir. 1984) (Tennessee's parole scheme created a liberty interest protected by the Due Process Clause), superseded sub. nom. Wright v. Trammel, 810 F.2d 589 (6th Cir. 1987) (subsequent amendment of Tennessee's parole statute mooted any liberty interest under the new statute).

In the instant case in 1978, Judge Feikens analyzed whether the State of Michigan granted a protectible liberty interest to inmates by mandating that the Parole Board follow certain procedures in the parole decision-making process. After analyzing Michigan's parole statutes (M.C.L.A. 791.232 et seq.) and MDOC regulations, Judge Feikens found that they created protectible constitutional

claims in favor of the appellees. He stated: "When, however, the state itself provides by statute or regulations that certain procedures be followed in determining whether or not an inmate is entitled to parole, independent liberty interests are created and the due process clause requires certain minimum procedures 'to ensure that the state-created right is not arbitrarily abrogated.'" August 1978 opinion (cited Meachum v. Fano and Wolff v. McDonnell, supra).

Judge Feikens also made clear that it was the statutory procedures and Parole Board regulations that created the liberty interest, not the decision whether to parole. He recognized that the Parole Board, after following the required procedures, reaches "its own conclusions on the desirability of releasing such

prisoner on parole by a majority vote. M.C.L.A. 791.235."[5]

In sum, although the Parole Board may have discretion in the eventual parole decision, the state, through statutes and regulations, has taken away any discretion in parole procedures. Therefore, the Michigan parole scheme is not wholly discretionary -- it limits the Parole Board's authority by requiring it to follow certain procedures. See, e.g., Walker, 558 F.2d at 1253-54; Spruytte,

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[5]We note that the cases upon which Judge Feikens relied in 1978 were the same cases upon which the Supreme Court relied for its decision in Greenholtz. Also, in its post-1979 decisions, the district court did not issue any opinions inconsistent with Greenholtz.

753 F.2d at 507-08.[6]

The appellants also argue that federal courts do not have jurisdiction to enforce procedures compelled or mandated by state law where there exists an ade-

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[6]In the hearing on this matter in 1990, Judge Taylor stated: "It's true, as defendants argue, that the release is a discretionary matter with the Commission. The pursuit of the appropriate procedures, however, in making the release determination is not discretionary, and the prisoners do have a liberty interest in that procedure being followed in each of their cases." Transcript, April 23, 1990.

quate available remedy under state law.[7] This is a curious argument for several reasons. The appellees are claiming a violation of their due process rights

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[7]Additionally, the appellants have raised an Eleventh Amendment defense to jurisdiction. The Eleventh Amendment prohibits a suit against a state when the state is the real party in interest. The case at hand seeks an injunction against state officials in their official capacities. The final consent decree is based on state law only to the extent that the state laws created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment. The consent decree is, in effect, an injunction granting prospective relief to the inmate class.

Relying upon Ex Parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), and Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), the Sixth Circuit has held that state officials may be sued in their official capacities for injunctive relief. Banas v. Dempsey, 742 F.2d 277 (6th Cir. 1984), aff'd, 474 U.S. 64 (1985); Freeman v. Michigan Dep't of State, 808 F.2d 1174 (6th Cir. 1987).

Therefore, the Eleventh Amendment is not a bar to the district court's jurisdiction over this action.

under the Constitution of the United States. The Supreme Court has ruled that a state-created liberty interest is entitled to the protection of the federal guarantee of due process. Vitek v. Jones, 445 U.S. at 490-91, 100 S.Ct. at 1262-63, 63 L.Ed.2d at 563-64 (1980), cited in Bossetta-Goodman v. Datacom Systems Corp., 644 F. Supp. 354, 358 (E.D. La. 1986), aff'd, 820 F.2d 1222 (1987). Therefore, a district court has jurisdiction to hear constitutional claims, such as those raised by the inmate class in the instant action.

Further, the remedy agreed to by both parties and presented to the court for its approval was the 1981 final consent judgment. By entering into the consent decree, the appellants waived their right to litigate the issues. The appellants

appear to be contradicting their original position of voluntarily settling this action with a consent decree in federal court by now asserting that available remedies existed under state law. In essence, the appellants are objecting to the enforcement of a remedy they selected. We find this argument untenable.

A federal court has jurisdiction to determine whether it has jurisdiction over the subject matter of an action. Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 376-78, 60 S.Ct. 317, 319-20, 84 L.Ed. 329, 334 (1940); Stoll v. Gottlieb, 305 U.S. 165, 171-72, 59 S.Ct. 134, 137, 83 L.Ed. 104, 108 (1938). "The rule has been that a court's determination that it has subject matter jurisdiction is res judicata of

the issue, if the jurisdictional question actually was litigated and expressly decided. . . . This is true even if the court is mistaken in its decision." 13A C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure, § 3536 (1984) (citing Stoll v. Gottlieb, supra). This rule also applies if a party had an opportunity to contest subject matter jurisdiction and failed to do so. Chicot County, supra.

Although the doctrine of res judicata is not applicable here, since this is not a subsequent lawsuit, the district court in 1981 entered a final order in which it ruled that it had jurisdiction. Furthermore, the lack of subject matter jurisdiction was raised by the appellants in their 1984 motion to vacate and was rejected by the district court. In fact,

the appellants' arguments on this appeal are almost identical to those made in 1984. Yet, the appellants did not appeal the 1984 judgment. They maintain that an appeal would have been futile, since the jurisdiction of the court was specifically tied to the duration of the monitoring period and there were only two days left in the monitoring period when the court denied the appellants' motion to vacate. (On November 28, 1984, the court denied the motion to vacate and extended the monitoring period until December 1984).

Certainly, the appellants' claims of lack of jurisdiction have been considered and specifically ruled upon by the district court. The appellants did not appeal or request rehearing of the court's 1984 jurisdictional decision, nor

did they appeal the reopening of the action in 1987 or the 1988 finding of the appellants' noncompliance with the consent judgment.

Alternatively, the appellants assert that, if the district court did have jurisdiction over this action initially, it lapsed with the end of the initial monitoring period in June 1985. This is because the 1981 consent judgment provided for jurisdiction only during the monitoring period. However, "the court has an independent duty to ensure that the terms of the decree are effectuated since an approved consent decree is not merely a compact between former litigants but is a court order." 10 Cyclopedia of Federal Procedure, § 35.25 at 294 (3d ed. 1984) (citing Stotts v. Memphis Fire Dep't, 679 F.2d 541 (6th Cir. 1982),

rev'd on other grounds sub. nom. Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 104 S.Ct. 2576, 81 L.Ed.2d 483 (1984)).

We have held that a case governed by a consent decree should not be closed when there are pending claims that the defendants have violated the decree. United States v. City of Cincinnati, 771 F.2d 161, 168-69 (6th Cir. 1985), cited in Youngblood v. Dalzell, 925 F.2d 954, 958 (6th Cir. 1991). Furthermore, the Supreme Court recently has held in an institutional reform action that the proper standard for deciding whether to dissolve a consent decree in a school desegregation case is whether the school district has complied in good faith with the decree since it was entered. The Court stated that the desegregation

decree at issue was not intended to rule in perpetuity, but was intended as a temporary measure to remedy past discrimination. Board of Educ. of Okla. City Public Schools v. Dowell, 498 U.S. ___, 111 S.Ct. 630, 636-38, 112 L.Ed.2d 715, 727-30 (1991).

In the district court's August 1987 order substituting counsel and reopening the action, the court ordered the appellees' substituted counsel to take all appropriate action, including reinstituting the monitoring period, required to enforce the court's consent judgment and to assure that the relief ordered by the court is provided for the inmate class. This order was brought about by a petition to enforce the judgment filed by a member of the inmate class, as well as dozens of letters from

Michigan inmates to the court alleging denials of due process as a result of the Parole Board's continued noncompliance with the 1981 consent judgment.

Although paragraph VIII(L) of the final consent decree sets a standard to govern termination of judicial supervision by tying it to the monitoring period, it was not error to reopen the action in light of claims that the appellants were violating the decree. Following Dowell, it is clear that the instant decree was not intended to operate in perpetuity, but that it is to be dissolved after the appellants have complied with it for a reasonable period of time. Id. Given the Supreme Court's recent guidance on this issue and the evidence in the record that the terms and purposes of the consent decree were not being met,

we are persuaded that judicial supervision was appropriate at that point.

It should be noted that this action was fully litigated in the district court. The parties voluntarily entered into a consent judgment to settle the action, and the court approved it. Consent judgments by their nature include compromises allowed by both parties, including waiving the right to litigate all the issues.[8] Therefore, the court never passed on the full merits of the action. However, the court did rule at the threshold that it had jurisdiction over the appellees' asserted constitutional claims. Thus, whether the appel-

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[8]For a more extensive discussion of consent decrees, see United States v. Armour & Co., 402 U.S. 673, 91 S.Ct. 1752, 29 L.Ed. 256 (1971).

lees' claims would have withstood an adjudication on the merits is unknown.[9] As the Supreme Court stated in Greenholtz, it is to be determined on a case-by-case basis.

Federal Rule of Civil Procedure 60(b)(4) provides: "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void." However, "a judgment is not void merely because it

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[9]As Justice Cardozo stated in United States v. Swift & Co., 286 U.S. 106, 116-17, 52 S.Ct. 460, 463, 76 L.Ed. 999, 1007 (1932): "We do not turn aside to inquire whether [these claims] could have been opposed with success if the defendants had offered opposition. Instead, they chose to consent, and the injunction, right or wrong, became the judgment of the court."

is erroneous. It is void only if the court that rendered it lacked jurisdiction of the subject matter . . . ." United States v. Manos, 56 F.R.D. 655, 659 (S.D. Ohio 1972), cited in 11 C. Wright & A. Miller, Federal Practice and Procedure § 2862 (1973); cf. Stoll, 305 U.S. at 171-72. "[I]f a court has the general power to adjudicate the issues in the class of suits to which the case belongs, then its interim orders and final judgments, whether right or wrong, are not subject to collateral attack so far as jurisdiction over the subject matter is concerned." 7 Moore's Federal Practice § 60.25[2] (discussing Rule 60(b)) (citing United States v. United Mine Workers of America, 330 U.S. 258, 289-94, 67 S.Ct. 677, 694-96, 91 L.Ed. 884, 911-13 (1947); Carter v. United

States, 135 F.2d 858, 861 (5th Cir. 1943)).

Here, the district court ab initio had subject matter jurisdiction to review asserted constitutional due process claims. Therefore, Rule 60(b)(4) is not applicable to void the consent judgment.

Accordingly, we affirm the district court's denial of the appellants' motion to vacate the consent decree and dismiss the action.

III. Modification

The appellees' issue on appeal is whether the district court erred by modifying a timeliness provision of the consent decree from "at least ninety days" to "at least thirty days," purportedly to comply with state law.

The final consent judgment originally

contained a provision that "[a]ll initial parole hearings shall be held at least ninety (90) days before a prisoner's earliest possible release date," with one exception. (Final consent judgment, § III(B)). The consent judgment states the purpose of the timeliness section: "A fairly administered parole process requires prompt hearings, prompt decisions, and prompt implementation of those decisions." (Final consent judgment, § III(A)). Implicit in the fact that both parties consented to this provision is that the ninety-day provision was necessary to avoid untimely decisions and releases. The appellees state that the provision was included to allow the Parole Board time to decide whether to parole, and then implement any releases by the parole eligibility date. In other

words, one of the purposes of the decree is to release prisoners on time.

The modification changed the timeliness provision at § III(B) of the consent judgment to read identically to M.C.L.A. § 791.235(1). That statute provides that the Parole Board hearing shall be conducted at least one month before the earliest release date.

Judge Taylor based her modification decision upon this analysis: "So the Court is not justified in requiring that a hearing be held before the statute requires it to be held, and I must move the hearing requirement up to match the statutory requirement, and all time requirements must be identical to those of the statute." Transcript, April 23, 1990 (emphasis added). The court relied upon unidentified Supreme Court cases

since 1981[10] in reasoning that, since the liberty interest involved is in the statutory procedure and not the release date, the decree should conform to the statutory procedure. Id.

Therefore, the court granted the one timeliness modification and rejected the other requested modifications. At the same time, the court found the appellants in noncompliance with the decree and appointed a special master to monitor the appellants' actions.

The appellants' motion for modification was based upon Rule 60(b)(5), Fed. R. Civ. P., which provides:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or pro-

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[10]We are unable to determine the origin of this reasoning or point to any Supreme Court cases for guidance.

> ceeding for the following reasons: . . . (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

The Sixth Circuit set forth standards for a Rule 60(b) modification of a consent judgment in Stotts v. Memphis Fire Dep't, 679 F.2d 541, 560-62 (6th Cir. 1982), rev'd on other grounds sub. nom. Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 104 S.Ct. 2576, 81 L.Ed.2d 483 (1984). Those standards allow modification (1) when done in accordance with basic principles of contract law; (2) when the decree is void or no longer equitable; (3) when the circumstances of the case change; or (4) when a better appreciation of the facts in the light of experience indicates that the

decree is not properly adapted to accomplishing its purposes.

The appellees assert that none of these standards were demonstrated by the appellants or found by the court below. The standard of review of a court's ruling on a Rule 60(b) motion is abuse of discretion. Stotts, 679 F.2d at 561; Akers v. Ohio Dep't of Liquor Control, 902 F.2d 477, 479 (6th Cir. 1990).

Changed circumstances may include either a change of fact or a change of law. System Fed'n No. 91, Railway Employees Dep't v. Wright, 364 U.S. 642, 646-47, 81 S.Ct. 368, 371, 5 L.Ed.2d 349, 353 (1961); Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 527, 106 S.Ct. 3063, 3078, 92 L.Ed.2d 405, 426 (1986). In the present case, the appellants argued that there

had been a change in the Michigan statute concerning the timeliness provision. They also argued changed circumstances as a result of the 1982 amendments to the state parole statutes. We recognize that significant changes were made to the Michigan parole statutes in 1982, subsequent to the entry of the instant consent decree.[11] However, we take notice that the statute in question, M.C.L.A. 791.235(1), was not amended subsequent to the entry of the consent decree. In fact, the district court in 1984 denied this same request for modification. However, even though the statute was exactly the same

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[11]We understand that the parole statutory changes made since 1981 were designed to streamline the parole decision-making process and promote efficiency, which is consistent with the purpose of the consent judgment. See plaintiffs' monitoring report at 33-36.

in 1981 as it was in 1990, the district court granted a modification of the consent judgment to make it identical to the statute.

One of the first and most widely accepted standards for modifying consent decrees was set forth by the Supreme Court in United States v. Swift & Co., 286 U.S. 106, 119, 52 S.Ct. 460, 464, 76 L.Ed. 999, 1008 (1932). This was a commercial case in which Justice Cardozo stated: "Nothing less than a clear showing of grievious wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned." Id.

However, we have held that consent decrees relating to institutions are "fundamentally different" from those

between private parties. Heath v. DeCourcy, 888 F.2d 1105, 1109 (6th Cir. 1989). This is because these types of decrees "reach beyond the parties involved directly in the suit and impact on the public's right to the sound and efficient operation of its institutions. Broader judicial discretion to modify the parties' agreement is required so that the agreed upon solution to the problem giving rise to the litigation may be fine-tuned to accomplish its goal." Id.

Therefore, in the context of institutional reform litigation, such as the instant action, the standard for modification pursuant to Rule 60(b) is more relaxed. In Heath, we articulated the standard as follows:

> [T]he court need only identify a defect or deficiency in its original decree which impedes achieving its goal, either because experience has

> proven it less effective, disadvantageous, or because circumstances and conditions have changed which warrant fine-tuning the decree. A modification will be upheld if it furthers the original purpose of the decree in a more efficient way, without upsetting the basic agreement between the parties.

Id. at 1110.

However, even applying the more relaxed standard to this institutional action, the district court did not have sufficient reason for granting the modification. Certainly, state law regarding the timeliness of initial parole hearings had not changed. Furthermore, the "at least ninety days" language in the consent decree met the statute's "at least one month" requirement. The statute does not limit the timing of hearings to no more than thirty days prior to the earliest release date; rather, it requires

that hearings be held "at least one month" prior to that date. Although broader in scope than the statute, the original decree did not violate the statute. Therefore, the consent decree and the state statute were not in conflict.

The Supreme Court has held that a federal court may enter a consent decree that provides broader relief than the court could have awarded after a trial, as long as the decree does not conflict with or violate the statute upon which it is based. City of Cleveland, 478 U.S. at 524-28, 106 S.Ct. at 3076-78, 92 L.Ed.2d at 425-27. The Court distinguished two earlier cases, System Fed'n No. 91, Railway Employees Dep't v. Wright and Firefighters Local Union No. 1784 v. Stotts, supra, on the basis that in each

there was a conflict between the judicial decree and the underlying statute. City of Cleveland, 478 U.S. at 524-28, 106 S.Ct. at 3076-78, 92 L.Ed.2d at 425-27. Therefore, a consent judgment may be entered and enforced where it provides relief broader than the specific language of the statute at issue.

Consistent with this analysis, the Supreme Court in Firefighters Local Union No. 1784 stated:

> It is to be recalled that the "scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it" or by what "might have been written had the plaintiff established his factual claims and legal theories in litigation."

467 U.S. at 574, 104 S.Ct. at 2585, 81 L.Ed.2d at 496 (quoting United States v. Armour & Co., 402 U.S. 673, 681-82, 91

S.Ct. 1752, 1757, 29 L.Ed.2d 256, 263 (1971)).

Moreover, given the lower court's finding of noncompliance by the appellants, it is apparent that the purpose of the consent judgment and the continuing need for it have not abated. It is evident from the court's statements made during the hearing on this matter (see supra) that the court thought it compelled to modify the consent decree. It is in this respect that we hold the district court erred. Without a conflict between state law and the consent judgment, the court was not compelled to modify the decree. Therefore, we reject the district court's reasoning upon which the decision to modify was based.

In sum, there has been no change in the statutory timeliness requirement

regarding initial parole hearings since the consent decree was entered. Nor is the original purpose of the decree's timeliness requirements (to make the parole system work fairly and promptly) furthered in a more efficient way by the modification. In light of the preceding, there was no justification or sufficient basis for the lower court to grant a modification. Accordingly, we hold that the district court abused its discretion, and we reverse.

IV. Conclusion

For the foregoing reasons, the judgment of the district court is AFFIRMED in part and REVERSED in part. We REMAND the action to the district court for such further relief or other orders as may be appropriate, pending a showing of compli-

ance for a reasonable period of time with the terms of the final consent decree. At a reasonable time after the objectives of the consent decree have been achieved, the parties may move the court, on due notice, for dissolution of the decree.

DAVID A. NELSON, Circuit Judge, concurring. I concur in the judgment and in all but Part II of the court's opinion.

The district court's power to grant injunctive relief in this case was, at the outset, problematic. The complaint was drafted on the theory that the defendant officials were depriving parole-eligible inmates of "liberty" without due process of law, a circumstance that would have justified the granting of redress under 42 U.S.C. § 1983. The problem was that neither state law nor federal law

created any substantive right to the "liberty" that release on parole would represent. The district court tried to circumvent the problem, as has been noted, by holding that when the state required "that certain procedures be followed in determining whether or not an inmate is entitled to parole, independent liberty interests are created...." In the light of subsequent case law, it is safe to say that this analysis was almost certainly incorrect.

A state creates a protected liberty interest, as we now know, "by placing substantive limitations on official discretion." Olim v. Wakinekona, 461 U.S. 238, 249 (1983) (emphasis supplied). If state law requires officials to follow a prescribed procedure in exercising their discretion, it may well give rise

to rights enforceable in a state court, but it does not, by itself, create any constitutionally protected "liberty interest" a deprivation of which can be redressed in federal court. "[A]n expectation of receiving [a particular kind of] process is not, without more, a liberty interest protected by the Due Process Clause." Id. at 250, n. 12 Cf. Inmates of Orient Correctional Institute v. Ohio State Adult Parole Authority, 929 F.2d 233, 237 (6th Cir. 1991).

It is probably unfortunate that this case was permitted to go forward in a federal court. The defendants having accepted the federal court consent decree without reservation, however, I agree that the challenge to the court's jurisdiction comes too late.

The parties to a lawsuit cannot con-

fer subject matter jurisdiction on a court by agreement, of course, but this does not preclude the compromise of legitimate and substantial legal questions. It would not have been fanciful, a decade ago, to think that a federal court could exercise jurisdiction over the case at bar -- and the defendants chose to enter into a compromise under which the plaintiffs agreed to terms that the defendants thought they could live with, while the defendants acceded to the notion that the district court had jurisdiction. The defendants having thrown in the towel on the jurisdictional issue then, I am not persuaded that they must be allowed to retrieve the towel now.

I fully endorse this court's suggestion that the consent decree should be

dissolved once its objectives have been achieved. Mindful of the fact that it would have been preferable to let the state courts of Michigan handle enforcement of Michigan's procedural rules for dealing with the release of Michigan prisoners on parole, I venture to express the hope that dissolution of the decree will come sooner rather than later.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JAMES ANTHONY SWEETON, et al.

Plaintiffs,
vs.

Civil No. 77-72230
HON. ANNA DIGGS TAYLOR

ROBERT BROWN, JR., et al.

Defendants.
_____/

ORDER

At a session of said Court held in the City of Detroit, Michigan on this __ day of May 24, 1990.

PRESENT: THE HONORABLE ANNA DIGGS TAYLOR, U.S. DISTRICT JUDGE

Plaintiffs' having filed a Monitoring Report dated January 31, 1990 and a Motion for Order Finding Defendants in Non-Compliance With the Consent Judgment and for Appointment of a Special Independent Master or Monitor and Other Appro-

priate Relief dated February 2, 1990, and Defendants having filed a Motion to Dismiss dated March 16, 1990, and this Court having reviewed the pleadings and heard oral argument on April 23, 1990, IT IS HEREBY ORDERED THAT

1. Defendants' Motion to Dismiss based upon the lack of jurisdiction of this Court is hereby denied;

2. Relief requested by Defendants is granted in part. Sec. III (B) of the Consent Judgment providing that all hearings shall take place within ninety days of the first earliest release date is modified to require that the initial parole interview shall be held at least thirty days prior to the earliest release date consistent with MCLA Sec. 791.235(1);

3. Plaintiffs' Motion for Order

Finding Defendants' In Non-Compliance with the Consent Judgment is granted with the following specific relief:

A. Monitoring of compliance with the Consent Judgment will continue for twelve months from the entry of this Order in the manner set forth in the Consent Judgment or as otherwise further ordered by this Court;

B. All parole cases, hearings, decisions and orders processed by the defendants shall be included in the data compilations and summaries for monitoring to determine compliance with the Consent Judgment's timeliness requirements;

C. Based upon the stipulation of Plaintiffs, parole reviews and decisions without hearings shall be included in the data compilations concerning timeliness as set forth in the Consent Judgment;

D. Parole guidelines shall be implemented and compliance with the Consent Judgment shall be reached within the monitoring period described above;

E. Plaintiffs' request for a special master/independent monitor is hereby granted. The duties of said individual shall be to monitor compliance, ascertain compliance problems and to develop, draft and assist in the implementation of the parole guidelines within the monitoring period. If the parties are unable to agree to an individual to serve as a special master/independent monitor, the parties shall have five days from the entry of this Order to submit the names and background information of three individuals whom they wish appointed by the Court.

IT IS SO ORDERED.

/s/
HON. ANNA DIGGS TAYLOR

Approved as to form:

MARTIN A. GEER
Attorney for Plaintiffs

THOMAS KULICK
Assistant Attorney General
Attorney for Defendants

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JAMES ANTHONY SWEETON, OSCAR PARTEE, AND JAMES SIKON, Individually and On Behalf of All Other Persons Similarly Situated,

Plaintiffs,

v

No. 77-72230
Hon. Anna Diggs Taylor

PERRY JOHNSON, Director of the Michigan Department of Corrections; LEONARD MCCONNEL, Chairman of the Parole Board of the State of Michigan; GORDON FULLER, HOWARD GROSSMAN, HONDON HARGROVE, DONALD THURSTON, DELORES TRIPP, and EDWARD TURNER-Members of the Parole Board of the State of Michigan,

Defendants.
_____/

FINAL ORDER: CONSOLIDATION OF OPINION, ORDER, AND CONSENT JUDGMENTS

Resolution of the contested issues in Sweeton v. Johnson has been through two

Partial Consent Judgments agreed upon by the parties and approved by the Court, and by an Opinion and Order of the Court on issues not included in the consent judgments. Specifically, the Court has entered judgments through the following steps:

1. Stipulation to the Entry of a Partial Consent Judgment, June 11, 1980.
2. Stipulation to the Modification and Entry of a Partial Consent Judgment, December 16, 1980.
3. Final Partial Consent Judgment (combining the Stipulations of June 11, 1980, and December 16, 1980), December 29, 1980).
4. Memorandum Opinion and Order, March 31, 1981.

This Final Order is a consolidation of the above documents.

It is hereby ordered that:

I. GENERAL

A. Pursuant to the statutes, rules, and policies which establish, define, and regulate the parole process, this process should be administered in an effective and fair manner, and afford each prisoner the rights to which he or she is entitled.

B. This Final Order is not intended to constitute an admission of liability by Defendants on those issues resolved by the Consent Judgments of June 11, 1980, and December 16, 1980.

II. INFORMATION

A. It is desirable that prisoners understand the parole process and their rights within this process. Prisoners will be provided information concerning

the parole process in order to permit them to participate more fully in the process and to more actively and responsibly plan for their futures.

B. The issuance of a parole information booklet will serve to increase this understanding.

C. Following are aspects of the parole information booklet:

1. The copy of the text of the parole information booklet is attached. See Attachment I. It shall be the responsibility of the Michigan Department of Corrections ("MDOC") to publish and distribute the booklet. See Section XI.
2. Included in the parole information booklet will be specific information about how to obtain access to a prisoner's file.

3. The parole information booklet shall be periodically updated to reflect changes in MDOC policy, and will be distributed to prisoners within 90 days after the approval of the change in policy by the Corrections Commission. For a period of 30 months after the signing of this Consent Judgment, any modification will be made with the advice and consent of Plaintiffs.

D. At the time that a prisoner's Parole Eligibility Report (PER) is prepared, the prisoner has the right to list individual(s) he or she does not want to act as spokesperson. The prisoner also has the right to add other names to this list subsequent to the preparation of the PER.

E. 1. No Resident Unit Manager

who has in the past written a negative PER about an inmate, or has been the subject of a lawsuit by him or her, shall prepare that inmate's PER if the inmate objects to the RUM preparing the PER.

2. If the entire Resident Unit Staff would be disqualified from preparing a PER under this section, then the available staff may prepare the PER.

3. Resident Unit Staff preparing a PER under the circumstances outlined in Section 2 shall not include a parole release recommendation in the PER unless such

a recommendation is requested by the inmate. The Parole Recommendation Statement shall read:

"The PER preparer offers no recommendation for or against parole."

F. MDOC policy will be amended to reflect this agreement as soon as possible, consistent with provisions of the Michigan Administrative Procedures Act (APA).

III. TIMELINESS

A. A fairly administered parole process requires prompt hearings, prompt decisions, and prompt implementation of those decisions.

B. All initial parole hearings shall be held at least ninety (90) days before

a prisoner's earliest possible release date, except for those prisoners in community status programs. In those cases, hearings shall be held at least thirty (30) days before the earliest possible release date.

C. The PER will be prepared at least ninety (90) days in advance of the official date on all twelve (12) month continuances.

D. Whenever it appears that a timely hearing has not been scheduled or held, for whatever reason, a hearing shall be held within forty-five (45) days of the date that the information concerning the missed hearing is received by the Parole Board.

E. If, for any reason, a parole hearing is not held in a timely manner, and the prisoner is subsequently con-

tinued, then the date set for that prisoner's next parole hearing shall be set as if the original hearing had been held in a timely manner.

F. Whenever a rehearing is required by policy, that rehearing will be scheduled within 45 days of the date of the receipt of the new information by the Board.

In all cases, the notice provided to the inmate shall contain a statement of the reasons for the rehearing, and the inmate shall be provided with a copy (or a summary, if the original material is exempt from disclosure) of any new evidence upon which a rehearing is based.

An inmate shall have the option of waiving notice and/or receipt of copies of new materials or evidence prior to a rehearing in cases where an immediate

rehearing can be scheduled in a period of time shorter than that necessary to provide notice or obtain copies of the new material, but such waiver shall not prevent a prisoner from subsequently obtaining such materials and/or evidence (or a summary, if the original material is exempt from disclosure).

G. Deferrals to secure additional information are to be avoided.

H. Policy Directive PD-DWA-45.11, which deals with Parole Eligibility Reports (PER), will be modified to reflect that all reports required pursuant to a policy directive shall be requested by the PER preparer at the time the PER is being prepared. PD-DWA-45.11 shall further make the PER preparer responsible for monitoring requests for such reports to insure their timely

receipt and placement in an inmate's file prior to the parole hearing. A check-box list shall be developed to aid the PER preparer in making and monitoring these requests.

Policy will be modified to require the PER preparer to request additional reports in the circumstances described in Attachment II.

I. For any report ordered by the Parole Board at a hearing, the following deadlines shall prevail:

In cases where the report originates within the MDOC, the report shall be prepared and communicated to the Parole Board within thirty (30) days of the hearing. In cases involving the securing and obtaining of Psychological Reports, the report shall be prepared and communicated to the Parole Board within forty-

five (45) days of the hearing. It shall be the responsibility of the MDOC Director's Office to see that all bureaus and offices comply with this deadline.

In cases where the report is from non-MDOC sources, the Parole Board shall request that it be furnished within thirty (30) days of the prisoner's hearing date.

In all cases, should the report not be received by the Parole Board within thirty (30) days, the Parole Board shall communicate with the source of the report and remind them to submit the report.

J. Whenever a "No Fixed Date" ("NFD") release is ordered, it shall be the responsibility of the MDOC to implement that release within thirty (30) days.

K. A prisoner may inform the Parole

Board of its failure to meet a timeliness requirement concerning scheduling a hearing, reporting the final decision from a hearing, or carrying out an ordered release, by sending the Department a Parole Reminder Form, Attachment III. These forms shall be made readily available to all prisoners in their housing units.

1. In the event that the Parole Board discovers that a hearing has not been held in a timely manner, then the provisions of Section III-D shall shall control.
2. In the event that the Parole Board discovers that a final decision has not been timely made, then the Board shall report a final decision within 20 days of the date the Parole Reminder Form is received by the

Parole Board.

3. In the event that the Parole Board discovers that a timely release has not been effected, the Board shall act with Michigan Department of Corrections to effect release within twenty (20) days of the date the Parole Reminder Form is received by the Parole Board.

L. A final decision to parole or continue an inmate shall be reached by the Board and communicated to the inmate at least thirty (30) days before the inmate's minimum release date or official date, except for those inmates in community programs. In community program cases, every effort will be made to inform the inmate of a final decision at the time of hearing. However, if the Board is unable to reach a final decision

at the time of hearing for a community program inmate, a final decision to parole or continue parole shall be reached and communicated to the inmate before the inmate's minimum release date or official date.

M. The MDOC and the Parole Board shall be deemed to be in substantial compliance with each segment of the timeliness deadlines of Section III unless it appears that these timeliness provisions are violated in over 5% of the cases before the Board for that segment. Section III M of this agreement is not intended to relieve the MDOC from its responsibility to remedy timeliness errors in individual parole release cases.

N. MDOC policy will be modified to reflect this agreement as soon as possi-

ble consistent with the provisions of the Michigan APA.

IV. REHEARINGS

A. Whenever the Board receives any communication concerning a prisoner after a Board action, and that information is considered in the Board's decision to continue a prisoner, or to suspend a decision of the Board granting parole, or in any other decision by the Board which will delay the inmate's release on parole over 45 days, the prisoner shall be entitled to a rehearing within forty-five (45) days from the date the Board receives the information. This rehearing shall be scheduled by the Board, without the necessity of request by the prisoner. The prisoner shall receive notice of this rehearing in accordance with the proce-

dure in Section III F of this agreement.

B. Whenever an inmate grieves an action or procedure of the Board, and that grievance is upheld, then, within forty-five (45) days of the grievance decision, that decision shall be implemented.

C. MDOC policy will be modified to reflect this agreement as soon as possible consistent with the Michigan APA.

V. FACTORS AND CRITERIA

A. The fair administration of the parole process requires that the Parole Board shall disclose to an inmate the reasons for any denial of parole and that whenever possible, the Board shall inform the inmate of actions he or she can take to advance his or her chances for a future parole.

B. The Parole Board shall be guided by the following principles in making parole release decisions:

1. A prisoner will be granted a parole upon the expiration of his minimum sentence, less regular and special good time where applicable, unless a majority of the Board reasonably believes that this release on parole would constitute a menace to society or to the public safety. The Parole Board's decision to grant or deny parole is subject to the conditions set forth in sub-paragraph 4, below.
2. Institutional misconduct will be considered in making a parole release decision only when the misconduct reasonably reflects an expectation that the prisoner will be a menace to society or to the public safety.

3. Until such time as the criteria referred to in Section V C are developed, the Parole Board shall utilize the factors set forth in Administrative Rule 715 (R791-7715) in making their decision whether to grant or deny a parole. Factors relied upon will be indicated in the statement setting forth the reason(s) for denial of parole.

4. Nothing herein is intended to alter, modify, divest, or otherwise limit the rights and duties which the Legislature has provided to the Parole Board within the parole decision-making process.

C. The MDOC shall develop objective criteria to assist Parole Board members in determining whether an individual is a threat to society. Plaintiffs will be

permitted to assist the MDOC by providing input in the development of these factors and will be kept informed of the factor development process.

D. In developing these criteria, the Parole Board shall, to the greatest extent possible, rely on factors within the control of the inmate.

E. In notifying an inmate that parole is denied, the Board shall, in specific, objective language, inform the inmate of the reasons for that denial. Mere repetition of the explanation contained in the Parole Board Action Summary Number Code does not constitute an adequate statement of reasons for the denial of parole.

F. When notifying an inmate that parole is denied, the Board shall, whenever possible, provide the inmate with

suggested actions which will enhance or ensure the chance of a future parole.

G. MDOC policy will be modified to reflect this agreement as soon as possible consistent with the Michigan APA.

H. The Board shall discuss the nature and circumstances of the crime or crimes with the inmate at the initial parole release interview.

VI. THE ROLE OF THE RESIDENT UNIT STAFF IN THE PAROLE PROCESS

A. Resident Unit Staff will be of assistance to inmates in the parole process by explaining the process to inmates and by assisting inmates in solving problems in that process.

B. Resident Unit Staff will have the following responsibilities in the parole process:

1. Explaining the parole process to prisoners.
2. Detecting and correcting errors in parole procedures and in records.
3. Discussing the parole hearing with the prisoner, and presenting information to the Board for or with the inmate upon request of the inmate.
4. Preparing and distributing the Parole Eligibility Report (PER), and assuring that all relevant policy-required documents are included in the prisoner's file.

C. In order to assist Resident Unit Staff in carrying out their responsibilities as spokespersons, additional staff training will be provided. This training will be developed by Defendants, with the advice and assistance of Plaintiffs. This training will include material on

the following topics:

1. Explanation of parole and good-time.
2. An overview of the parole hearing process.
3. An explanation of the role of the Resident Unit Staff in the parole process.
4. Training on how to prepare a PER.
5. Training concerning ordering and obtaining necessary reports.
6. Training concerning correcting errors in inmates' files.
7. Training on the spokesperson's role at a parole release hearing.
8. Training on counseling inmates and on commonly raised questions about parole.
9. Training in the use of the Parole Reminder Form and the Parole Board Inquiry Form.

D. Defendants, with the advice and assistance of Plaintiffs, will develop policy directives or memoranda necessary to instruct ongoing Resident Unit Staff in their responsibilities in the parole process.

E. The training described in paragraph C above, will be included in the Department's Resident Unit Staff new staff orientation and training program. Defendants will provide adequate time to parole training in this program. The parties anticipate that approximately eight hours will be necessary for this training.

F. Whenever possible, ongoing Resident Unit Staff shall be included in the parole process training program provided for new staff.

G. Whenever possible, Defendants

will provide parole process training to ongoing staff through staff meetings or education sessions, in addition to the instructional memoranda described in paragraph D above.

H. MDOC policy will be modified to reflect this agreement as soon as possible consistent with the Michigan APA.

VII. PRISONERS SENTENCED TO LIFE IMPRISONMENT

A. Each inmate sentenced to life imprisonment and within the scope of M.C.L.A. §791.234(4) shall be brought before the Board for a parole release hearing as soon as is feasible after the inmate has served seven calendar years on his sentence. The inmate shall be re-interviewed by the Board at no greater than 36-month intervals after the initial

parole hearing.

B. All other provisions of MDOC policy relating to parole release shall apply to inmates considered under this section.

C. Each inmate sentenced to life imprisonment for whom pardon or commutation is necessary for release from confinement shall have a public hearing within a reasonable time, not to exceed 90 days, following the recommendation for pardon by the Parole Board.

VIII. ENFORCEMENT AND MONITORING

A. In order to detect and prevent procedural errors in the parole process, mechanisms must be developed to monitor that process. The primary responsibility for coordination of the parole process and the prevention of widespread errors

rests with the MDOC, through its Director's office. To assure compliance with the specific mandates of this Order, Defendants will make relevant MDOC records available to Plaintiffs, including any non-exempt records of selected inmates' files.

B. All administrative rules, policy directives, memoranda, and other documents containing statements of general application to the parole process shall be provided to Plaintiffs. Plaintiffs shall object to any policy or rule of general application inconsistent with the terms of this Order.

C. Parole Reminder Forms, Parole Board Inquiry Forms, and the grievance procedure shall exist to resolve inmates' complaints about the parole process. To monitor these systems, Plaintiffs will be

provided with a summary of the number and type of complaints handled by each system. Upon request, Plaintiffs will be permitted to inspect and copy individual complaints from each of these systems. The summaries of inmate complaints from the Reminder Forms, Inquiry Forms, and grievances will be provided to Plaintiffs' attorneys at three-month intervals during the pendency of this decree.

D. Defendants agree to implement the rehearing process as described in Section IV of this Order. To assure compliance, Defendants will log the rehearings ordered by the Board, with a short explanation of the reason for the rehearing. Plaintiffs will be provided with copies of these logs at three-month intervals during the pendency of this decree.

E. Defendants agree to assure that

Parole Board Action Sheets and Parole Board Work Sheets shall contain no inflammatory statements, shall state the reason for the denial of the parole, and shall provide the prisoner with advice for securing parole in the future. To this end, Defendants shall provide Plaintiffs with a sample of 20 recent continuances by each Parole Board member with worksheets attached. Plaintiffs shall comment to each Board member on these continuances, with recommendations on how to prevent non-informative or inflammatory action sheets. This review will be repeated at three-month intervals during the pendency of this decree.

F. Parole information booklets, Parole Reminder Forms, and Parole Eligibility Reports will be prepared and distributed to prisoners. Defendants

will develop a method of recordkeeping which reflects the date of receipt of each of these items. The parties will work together to develop a method of monitoring MDOC performance in this area. Plaintiffs may develop a questionnaire or file review method of assuring proper delivery of these items. If they do so, Defendants will provide them with sufficient access to non-exempt MDOC records to permit them to monitor MDOC performance in these areas.

G. Resident Unit Spokespersons shall be trained to assist inmates in the parole process, including prisoners' rights relative to the parole process. To monitor the training and performance of spokespersons: (1) Plaintiffs will participate in the planning of and be informed of the parole training for both

ongoing and newly-hired and promoted Resident Unit Staff; Plaintiffs may arrange, upon request, to view MDOC parole process training; (2) Plaintiffs' attorneys may arrange, upon request, to view specific or random parole release hearings.

H. PER's will be prepared and distributed at least 30 days before parole release hearings. The parties agree that policy-required reports will be included in the inmate's file, along with other materials and documents the inmate deems relevant and/or beneficial to a just decision, before parole release hearings. Plaintiffs' attorneys shall be permitted access to MDOC and Parole Board records in order that they may monitor MDOC compliance in this area.

I. The parties shall develop a com-

puter program method of monitoring the timeliness of parole hearings, of final parole decisions, and of releases. This program shall include information on all parole release hearings, decisions, and releases for each category, including cases where a final decision is made at hearing and cases where a final decision is deferred. This program shall include a mechanism for accounting for cases which are in the system (with no final decision or release) at the end of a reporting interval. This program shall include sub-categories for the exceptions of the general timeliness standards recognized in this Order. This program shall be in operation on or before September 1, 1980. The reports generated by this monitoring system shall be provided to Plaintiffs monthly, unless the

parties agree that a longer report period more efficiently describes case activity or unless Defendants demonstrate significant cost savings by submitting the reports at three-month intervals.

J. In order to detect and correct errors in the parole process, there shall exist:

1. A Parole Reminder Form, as described in § III K above, and attached, which will permit an inmate to bring to the attention of the Board any missed deadline in holding a parole hearing, making a final decision as a result of parole hearing, or effecting a release.
2. A Parole Board Inquiry Form, which will permit an inmate, through his or her counselor, to bring directly to the attention of the Board any ques-

tion concerning the processing of that inmate's parole.

3. The MDOC grievance process, which permits an inmate to question the propriety of departmental actions through a review of the action by institutional staff and the MDOC administration.

K. The parties shall undertake such further steps as necessary to assure that the parole process is in accord with law and policy by monitoring specific aspects of the parole process.

L. Plaintiffs' participation in monitoring described in this section shall continue for 30 months, unless the Court extends this period for good cause shown. The Court shall retain jurisdiction of this cause for the pendency of this monitoring period, and shall have the power

to make further orders consistent with this decree.

M. MDOC policy shall be modified to reflect this agreement as soon as possible consistent with the Michigan APA.

IX. MATERIAL SUBMITTED TO THE BOARD

A. A prisoner shall have the right to bring to the attention of the Board any material s/he deems relevant to parole consideration. Such material shall be included in the prisoner's file upon request.

X. INMATE ACCESS TO FILES

A. The procedures through which inmates gain access to MDOC records, including prisoner files, are defined by the Michigan Freedom of Information Act.

B. Inmates who face the Parole Board

are entitled to know the information upon which Parole Board members will make their decision. Inmate requests for access to files which are understandable to an average person must be complied with by the MDOC.

C. Copy Access to Central Office Files. Requests to obtain copies of documents from the Central Office file need only be descriptive enough to sufficiently enable the public agency to find the public record. Inmate requests for "my file," "all the documents in my file," or the like, shall be complied with in full, by prompt provision of copies of all non-exempt documents found in the file. Subsequent similar requests shall be met by the provision of all non-exempt documents in the file which came into the file since the last request.

D. Physical Access to Central Office Files. The Department is not required to transport inmates to Lansing or to transport Central Office Files to the institutions in order to provide inmates physical access to these Files. However, an inmate may designate a representative who may inspect, review, and/or obtain copies of non-exempt documents contained in Central Office Files. Such representative shall present a signed, written release before inspection, review, or receipt of copies.

E. Copy Access to Institutional Files. Requests for copies from institutional files shall be handled in the same manner as ordered for copy access to Central Office files. That is, copies of documents contained in institutional files shall be provided to inmates upon a

request which permits the MDOC to identify the request.

F. Physical inspection of Institutional Files may not be restricted by harsh limitations to annual or bi-annual inspections, which are unreasonable. Inmates should be allowed to inspect or obtain copies from the Institutional File or any documents added since their last inspections, no matter how near in time. Any arbitrary limitation on the number of times during a year a file may be inspected cannot stand.

G. The MDOC may provide copy access to institutional files for inmates in segregation or otherwise separated from the main population for disciplinary reasons under separate procedures.

H. Limits on the amount of time for study of file materials are arbitrary and

may not be maintained; but prison authorities can exercise reasonable discretion to insure that inmates examining files are not taking advantage of this ability to spend undue amounts of time away from other required activities.

I. Requests for copies or for physical inspection shall be promptly answered within a five-day response period.

J. The Department shall disclose records to inmates according to the procedures and time limits of the Michigan Freedom of Information Act, except those records specifically exempted under § 13 of the Act. In applying the Act, there is a presumption in favor of disclosure of all Department records and the exemptions contained in § 13 shall be narrowly construed. In general, only those documents whose disclosure would pose a seri-

ous risk of harm to the inmate or others, or invasion of another's privacy should be exempt from disclosure.

K. Nothing in this Order should be construed to invalidate or render unnecessary those parts of Defendants' current policies which are designed to protect inmate's right of access.

L. Monitoring of compliance with the file access aspects of this Order shall be conducted by Plaintiff's counsel for a period of six months from the date of entry of this Order. Defendant shall implement a log process for FOIA requests essentially similar to the present Central Office log process at each institution by July 1, 1981. Defendants shall send to Plaintiff's counsel copies of their FOIA request log sheets for each institution and the Central Office during

a six month monitoring period. Plaintiff's counsel will be permitted access upon request to inspect and receive copies of individual FOIA requests and responses at the MDOC Central Office or at any MDOC institution. Defendants shall send to Plaintiff's counsel, on a monthly basis, during the monitoring period, copies of all form FOIA denials generated by Defendant's Central Office word processing equipment.

M. MDOC policy will be modified to reflect this Order as soon as possible and consistent with the Michigan APA.

XI. DISTRIBUTION OF PAROLE INFORMATION BOOKLET

A. The parole information booklet, as defined in § II, shall be distributed as follows:

1. The parcle information booklet shall be included as a section of the Resident Guide Book which is given to each inmate upon entering the corrections system.

2. The parole information booklet also shall be distributed as a separate booklet to inmates at the time they begin the parole process, that is, at the inmate's initial meeting with a counselor to begin preparation of the Parole Eligibility Report (PER).

DATED: 28 Aug 1981

/s/
JUDGE ANNA DIGGS-TAYLOR

Approved by:

WAYNE COUNTY NEIGHBORHOOD
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(313) 962 9015

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WILLIAM H. GOODMAN (P 14173)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JAMES ANTHONY SWEETON, et al.,

Plaintiffs,

v

PERRY JOHNSON, et al.,

Defendants.
_____/

Civil Action
No. 77-72230
Honorable Anna
Diggs-Taylor

AMENDMENT OF FINAL ORDER

At a session of said Court held in the City of Detroit, County of Wayne, on the 10th day of August, 1981.

PRESENT: Honorable Anna Diggs-Taylor
U.S. District Judge

Upon the reading and filing of the Stipulation and Agreement entered into by both parties and approved by the Court and the Court being fully advised on the premises,

NOW, THEREFORE, IT IS HEREBY ORDERED

AND ADJUDGED that the Final Order, heretofore entered in this cause on March 31, 1981 be and is hereby Amended as follows:

1. The Michigan Freedom of Information Act, MCLA 15.231 et seq; MSA 4.1808(1) et seq does not, in and of itself, create a constitutional due process right of access to prisoner records giving rise to a cause of action enforceable under 42 USC § 1983.

2. Plaintiffs' claim of access to prisoner records, originally brought pursuant to 42 USC § 1983, is now treated as a pendent state claim arising under the Michigan Freedom of Information Act and further, said claim was litigated upon cross Motions for Summary Judgment and upon which Plaintiffs substantially prevailed.

3. The rights set forth in Part X

of the Final Order entered in this cause are rights recognized by and secured to Plaintiffs under state law.

4. The stipulation amending the Court's order, and the Court's order approving this stipulation shall not become final until 60 days from the date of entry of the Court's order approving the stipulation. Within this 60 day period:

Defendants shall promptly effect notice to class of this proposed settlement through posting the attached notice in all institutions and by publication in the penal press. This notice shall be effected within 30 days.

If the Court receives no response objecting to this stipulation and order from any class member within 60 days from the date of entry of the Court's order

approving the stipulation, the order shall become final automatically.

If, however, the Court receives any response from any class member within 60 days objecting to any provision of this order, the Court will consider such objections and, in its discretion, grant final approval to the stipulation and order or schedule a hearing for considerations of the objections.

DATED: 28 Aug 1981 (s)
JUDGE ANNA DIGGS-TAYLOR

BY: /s/
ROBERT F. GILLET (P 29119)

BY: /s/
JUDITH MAGID (P 24525)

BY: /s/
WILLIAM H. GOODMAN (P 14173)

BY: /s/
Thomas M. Loeb (P 25913)

BY: /s/
Mark I. Leach (P 24343)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JAMES ANTHONY SWEETON, OSCAR PARTEE, JAMES SIKON, STEVEN GODFREY, DONALD R. JONES, MICHAEL WDOWYN, JR., JOHNNIE HENDERSON, AND RONALD SHELBY, Individually and on Behalf of All Other Persons Similarly Situtated,

Plaintiffs,

v.

CIVIL ACTION NO: 7-72230

PERRY JOHNSON, Director of the Michigan Department of Corrections; LEONARD MCCONNELL, Chairman of the Parole Board of the State of Michigan; GORDON FULLER, HOWARD GROSSMAN, HONDON HARGROVE, DONALD THURSTON, DELORES TRIPP and EDWARD TURNER, Members of the Parole Board of the State of Michigan.

Defendants.
_____/

OPINION

Plaintiffs are inmates at the Southern Michigan State Prison who seek

injunctive and declaratory relief individually and on behalf of all other inmates of Michigan penal institutions who are similarly situated. They claim that the policies and procedures employed by the state in deciding whether or not to grant parole deny them their rights to due process of law as secured by the Fourteenth Amendment to the United States Constitution. They also claim that the procedures employed by the members of the Parole Board violate the Michigan Administrative Procedures Act and relevant Parole Board and Department of Corrections regulations.

Plaintiffs filed a motion seeking certification as a class. Defendants opposed that motion and in a motion supported by extensive affidavits and exhibits, seek dismissal or in the alter-

native summary judgment. Pursuant to my letter on May 26, 1978, the motion for class certification has been held in abeyance while the motion to dismiss or in the alternative for summary judgment was being considered.

Defendants' motion to dismiss is granted as to the claims raised under the United States Constitution, but the alternative motions are denied as to the claim that the state is not complying with its own statutes and regulations.

I.

The question of which of the requirements of due process under the Fourteenth Amendment, if any, are applicable to parole release proceedings has been the subject of considerable litigation in the past few years. See cases cited in Scott

v. Ketucky Parole Board, 429 U.S. 60, 61, n.1 (1976). This litigation has produced a split among the circuit courts of appeal. Scott, at 61, n.1; compare, e.g. Williams v. Ward, 556 F.2d 1143, 1158 (2d Cir. 1977) ("It has been settled in this Circuit since 1974 that the interest of an inmate in a parole release decision is subject to some due process protections.") with Scarpa v. U.S. Board of Parole, 477 F.2d 278, 282 (5th Cir. 1973) (Finding no deprivation of a protected interest) and Brown v. Lundgren, 528 F.2d 1050 (5th Cir. 1976). cert. denied, 429 U.S. 917 (1976) (Due process does not apply to parole eligibility process.) It appears that the decisions of the U.S. Court of Appeals for the Sixth Circuit are in agreement with the holding of the Fifth Circuit in Scarpa

and Brown, that an inmate has no constitutionally protected interest in a parole release decision.

On January 15, 1975 the Sixth Circuit entered an order in Scott v. Kentucky Parole Board, No. 74-1899. In that case the plaintiffs were "seeking a determination that parole release procedures of the Kentucky Parole Board failed to conform to the minimum guarantees under the due process clause of the Fourteenth Amendment of the United States Constitution." Id., at 1. The district court had dismissed the complaint, and the court of appeals affirmed that dismissal stating that "the complaint alleged no violation of rights guaranteed to the plaintiffs under the United States Constitution." Id., at 2.

The United States Supreme Court

granted certiorari, but merely vacated the judgment of the court of appeals and remanded for consideration of mootness. Scott v. Kentucky Parole Board, 429 U.S. 60 (1976). Justice Stevens dissented from the Court's decision, and in his dissent he summarized the holding of the court of appeals to be that "the requirements of due process are not applicable to parole release hearings." Id., at 61, n.1.

On remand the Sixth Circuit held that the case was not moot, but restated its previous holding that no violations of rights guaranteed by the United States Constitution had been alleged and again affirmed the district court's dismissal. Scott v. Kentucky Parole Board, 556 F.2d 805 (6th Cir. 1977). Certiorari was denied on November 14, 1977. 98 S.Ct.

492.

Prior to its consideration of Scott, the Supreme Court had an opportunity in Meachum v. Fano, 423 U.S. 215 (1976), to consider the related question of whether or not there is a due process right to a hearing prior to a prison transfer. The Court stated:

> Holding that arrangements like this are within reach of the procedural protections of the Due Process Clause would place the Clause astride the day-to-day functioning of state prisons and involve the judiciary in issues and discretionary decisions that are not the business of federal judges. We decline to so interpret and apply the Due Process Clause. The federal courts do not sit to supervise state prisons, the administration of which is of acute interest to the States. Preiser v. Rodriquez, 411 U.S. 475, 491-492 (1973); Cruz v. Beto, 405 U.S. 319, 321 (1972); Johnson v. Avery, 393 U.S. 483, 486 (1969). The individual States, of course, are free to follow another course, whether by statute, by rule or regulation, or by interpretation of their own constitutions. They may thus decide that prudent prison administration requires pre-

> transfer hearings. Our holding is that the Due Process Clause does not impose a nationwide rule mandating transfer hearings. Id., at 228-229.

The Court recognized that the record of such a transfer might affect the possibilities of parole, but stated that due process requirements have not been held applicable to the parole release decision making process.

> Nor do we think the situation is substantially different because a record will be made of the transfer and the reasons which underlay it, thus perhaps affecting the future conditions of confinement, including the possibilities of parole. The granting of parole has itself not yet been deemed a function to which due process requirements are applicable. See Scott v. Kentucky Parole Baord, No. 74-6438, cert. granted, 423 U.S. 1031 (1975). Id., n.8.

Nor has the Supreme Court subsequently held that parole release proceedings must be accompanied by due process

procedural safeguards. On October 17, 1977, at 434 U.S. 910, certiorari was denied in Scott v. Williams, No. 76-6612 and Lay v. Williams, No. 76-6858. Justice White, who was joined by Justice Brennan, wrote a dissent describing these two cases as follows:

> These two cases raise once again the question of whether parole release determinations implicate an interest in liberty entitled to protection under the Due Process Clause of the Fourteenth Amendment. Petitioners in both cases contend that the Oklahoma Pardon and Parole Board acted unconstitutionally in denying them parole without affording them an opportunity to appear personally before the Board and providing them with reasons for its decision. The Oklahoma Court of Criminal Appeals denied relief.
> 434 U.S. at 910.

The foregoing statements and actions in the United States Supreme Court and the U.S. Court of Appeals for the Sixth Circuit establish the proposition that,

in this circuit at least, the requirements of due process are not applicable to parole release hearings. Accordingly, defendants' motion to dismiss for failure to state a claim upon which relief can be granted is granted as to plaintiffs' claims that the procedures employed by the State of Michigan violate their rights to due process under the United States Constitution.

II.

The first section of this opinion dealt with what due process rights plaintiff inmates have directly under the United States Constitution. When, however, the state itself provides by statute or regulations that certain procedures be followed in determining whether or not an inmate is entitled to

parole, independent liberty interests are created and the due process clause requires certain minimum procedures "'to ensure that the state-created right is not arbitrarily abrogated.'" Meachum v. Fano, supra at 226, quoting Wolff v. McDonnell, 418 U.S. 539, 557 (1972).

Perry v. Sindermann, 408 U.S. 593 (1972), and Board of Regents v. Roth, 408 U.S. 564 (1972) establish that a property interest subject to due process protection is one within

> a broad range of interests that are secured by "existing rules or understandings." [Roth] at 577. A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing. Perry, supra at 601.

Wolff v. McDonnell, supra, 418 U.S. at 557-58, establishes that the analysis

of liberty interests is parallel to the property interests and can be created by rules or mutually explicit understandings. In Walker v. Hughes, 558 F.2d 1247 (6th Cir. 1977) the Sixth Circuit held that prison policy statements gave inmates a liberty interest in having certain minimum due process safeguards observed in disciplinary proceedings. The court goes to considerable length to show that this interest would not exist in the absence of such prison policy statements. Id., at 1256.

Several courts of appeal have applied this analysis to a parole release proceedings and required that the parole granting authorities follow their own regulations. See, e.g., Burton v. Ciccone, 484 F.2d 1322 (8th Cir. 1973); Franklin v. Shields, 569 F.2d 784 (4th

Cir. en banc 1978), cert. denied, 98 S.Ct. 1659 (1978).

The Michigan Department of Corrections rules were filed with the Secretary of State subsequent to the filing of the complaint and plaintiffs have withdrawn their claim that the regulations were not promulgated in accordance with the Michigan Administrative Procedures Act.

The Michigan parole system is generally empowered and operates under a Michigan statute, M.C.L.A. 791.232 et seq. This statute sets out certain procedures that the Parole Board must follow and requires that at least one month prior to the expiration of the minimum term of each prisoner eligible for parole that the prisoner and all pertinent information about him be brought before the Board. The Board is then to reach

its own conclusions on the desirability of releasing such prisoner on parole by a majority vote. M.C.L.A. 791.235. Parole Board regulations require that prisoners have access to their files, an opportunity to make statements on their own behalf, and an opportunity to challenge the truth or relevance of any material submitted to the Parole Board. The Board's regulations also require written summaries of Board actions, a statement of the reasons for those actions, and specification of any conditions to be met during a passover period. Having established these procedures by statute and Corrections Department regulations, the state cannot ignore or violate them without abrogating a prisoner's rights. Walker v. Hughes, supra; Wolff v. McDonnell, supra. Consequently, defen-

dants' motion to dismiss is denied as to the claim that the state did not comply with its own statutes and regulation in deciding whether or not to grant parole release to plaintiffs.

Defendants' motion for summary judgment on this claim is also denied because there are genuine issues of material fact that remain to be resolved. Defendants' brief and affidavit in support of their motion for summary judgment allege that there have been no violations of any statute, Corrections Department Policy Directives, or the Parole Regulations. Plaintiffs offer affidavits giving specific incidents of alleged violations, and allege established practices of defendants which ignore and violate the relevant statutes, rules and regulations. Some of the more serious violations

alleged are: (1) failure to have all pertinent information assembled by the date specified in M.C.L.A. 791.235 necessitating delays in rendering decisions and in ultimate release dates; (2) failure of the Board to advise prisoners in advance of the factors to be considered, as required by Policy Directive 45.09; (3) failure to provide meaningful access to information to be relied upon by the Board as required by Policy Directive 45.09; (4) making it difficult or impossible for prisoners to gain access to their files in de facto violation of Policy Directive 45.09 and the Michigan Freedom of Information Act; (5) failure to follow Policy Directive DWA-40.02 regarding disclosure of psychological and psychiatric evaluations; (6) denial of a meaningful opportunity to present evi-

dence or challenge material relied upon by the Board; and (7) giving inadequate statements of reasons for Board action in violation of Policy Directives 45.05 and 45.09.

This case involves disputes over the procedures employed by the Parole Board and the complex interaction of statutes, policy statements, and practice that require the development of a factual record before a decision can be rendered. When the pleadings and affidavits before the court are construed in favor of the party opposing the motion and that party is given the benefit of favorable inference that can be drawn from the evidence, U.S. v. Diebold, Inc., 369 U.S. 654, 655 (1962), there are sufficient issues of fact that remain to preclude the granting of a motion for summary judgment. This

is particularly true because this a civil rights suit in which claims must be closely scrutinized. Perry v. Sindermann, supra. The defendants' motion for summary judgment is denied as to the claim that the state does not comply with its own statutes and regulations.

III.

Plaintiff's motion for class certification is still outstanding. Any further briefs that the parties may wish to submit on that question should be filed by September 15, 1978, and the motion will be heard on September 28, 1978, at 3:00 p.m.

An appropriate order may be submitted.

/s/
JOHN FEIKENS
UNITED STATES DISTRICT JUDGE

DATE: AUGUST 17, 1978
Detroit, Michigan